**MING HOLDINGS (M) SDN BHD**

**v.**

**YUSOF LATIF HOLDINGS (M) SDN BHD**

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: P-02-334-2001]
28 MARCH 2006

***COMPANY LAW:*** *Shares - Ownership of shares - Whether plaintiff entitled to shares - Whether defendant had a lien over shares - Separate legal entity - Whether trial judge entitled to accept evidence of plaintiff in preference to that of defendant*

***CIVIL PROCEDURE:*** *Appeal - Interference by appellate court - Fact, findings of - Whether interference warranted - Whether trial judge made decision based on issues raised by parties*

This was an appeal by the defendant against the judgment entered against it for the return of two share certificates in a company known as Global Harvest Sdn Bhd. The plaintiff's case was that it was the owner of the two share certificates in question and that it was *prima facie* entitled, therefore, to have its property back. The defendant, however, contended that it was entitled to a lien over the two share certificates by reason of an antecedent transaction between it and the director of the plaintiff, one Dato Yusoff Latif. The learned trial judge concluded, after a careful analysis of the evidence, that the plaintiff was entitled to have its shares. An appeal was brought to this court against that finding and the case was remitted to the learned judge. The learned judge's initial decision was not altered by his reconsideration of the issues remitted to him by this court. The only issue requiring determination was whether the learned judge was entitled to accept the evidence of the plaintiff in preference to that of the defendant.

**Held (dismissing the appeal)**
**Per Gopal Sri Ram JCA:**

**(1)** There was not a scrap of evidence either by way of correspondence or a board resolution evidencing the agreement asserted by the defendant. In these circumstances, applying

A the approach in *Clarke v. Edinburgh & District Tramways Co*, it was the duty of this court to defer to the learned judge's finding of fact that there was no agreement between the defendant and the plaintiff. Nowhere in its pleaded case was there mention of an agreement between itself and the plaintiff
B in respect of the shares. As may be seen from its amended case already referred to earlier, its dealings were with Dato Yussof Latif. It was apparent that there was confusion in the defendant's mind about the dealings that formed the factual matrix of its defence. It was trite that a company is a separate
C individual from its shareholders and directors and that the property of the company belongs to the company, not to the shareholders or directors (*Salomon v. Salomon & Co* folld). The duty of the trial judge was to decide the issues raised by the parties and the learned judge, it was quite clear, had adhered
D to this rule. (paras 8, 9, 10 & 11)

***Bahasa Malaysia*** *translation of headnotes*

Ini adalah rayuan defendan terhadap keputusan yang
E mengarahkannya mengembalikan dua sijil saham dalam sebuah syarikat yang dikenali sebagai Global Harvest Sdn Bhd kepada plaintif. Kes plaintif adalah bahawa ia adalah pemilik sijil-sijil tersebut, dan oleh itu secara *prima facie*nya berhak untuk mendapat kembali harta berkenaan. Defendan bagaimanapun
F berhujah bahawa ia mempunyai lien ke atas dua sijil tersebut ekoran dari transaksi yang dimasukinya dengan pengarah plaintif, seorang Dato Yusoff Latif. Yang arif hakim bicara, atas keterangan di hadapanya, memutuskan bahawa plaintif berhak kepada saham-saham. Rayuan telah dibuat ke mahkamah ini terhadap keputusan
G tersebut dan kes dikembalikan semula kepada hakim bicara. Namun begitu, keputusan awal hakim bicara atas penilaian semula isu-isu yang dikemukakan kepadanya oleh mahkamah ini masih tidak berubah. Isu tunggal yang berbangkit adalah sama ada yang arif hakim berhak menerima pakai keterangan plaintif berbanding
H dengan keterangan yang dikemukakan oleh defendan.

**Diputuskan (menolak rayuan)**
**Oleh Gopal Sri Ram HMR:**

**(1)** Tidak ada sebarang keterangan sama ada melalui surat
I menyurat mahupun resolusi lembaga yang menunjukkan wujudnya perjanjian seperti yang dikatakan defendan. Dalam keadaan sedemikian, dan menggunapakai pendekatan kes *Clarke*

*v. Edinburgh & District Tramways Co*, menjadi tugas mahkamah ini untuk memakai dapatan fakta yang arif hakim bahawa tidak terdapat apa-apa perjanjian di antara plaintif dan defendan. Tiada suatu pun dalam kes yang diplidkan defendan yang menyebut mengenai perjanjian di antaranya dengan plaintif berkaitan saham-saham berkenaan. Seperti yang dapat dilihat dari kes terpindanya yang dirujuk sebelum ini, urusannya adalah dengan Dato Yussof Latif. Agak nyata bahawa terdapat kekeliruan pada tanggapan defendan mengenai urusan yang menjadi teras pembelaannya. Adalah sesuatu yang mantap bahawa sebuah syarikat adalah individu yang tersendiri dan terasing dari pengarah serta pemegang-pemegang sahamnya dan bahawa harta syarikat adalah kepunyaan syarikat dan bukannya milik pengarah atau pemegang-pemegang sahamnya (*Salomon v. Salomon & Co* diikuti). Tugas hakim bicara adalah untuk memutuskan isu-isu yang dibangkitkan oleh pihak-pihak dan tugas ini jelas telah dilaksanakan oleh yang arif hakim.

**Case(s) referred to:**

*Clarke v. Edinburgh & District Tramways Co [1919] SC (HL) 35* ***(foll)***
*Hj Mohamed Dom v. Sakiman [1956] MLJ 45 CA* ***(refd)***
*Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA* ***(refd)***
*Salomon v. Salomon & Co [1897] AC 22* ***(foll)***

*For the appellant - Tan Swee Cheng; M/s Cheong Wai Meng & Van Buerle*
*For the respondent - RJ Manecksha; M/s Ong & Manecksha*

*[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-158-1996]*

*Reported by Suresh Nathan*

## JUDGMENT

## (Oral)

**Gopal Sri Ram JCA:**

**[1]** This is the judgment of the court.

**[2]** This is an appeal by the defendant in the court below against the judgment entered against it for the return of two share certificates in a company known as Global Harvest Sdn. Bhd. The plaintiff's case is simple enough. It says it is the owner of the two share certificates in question. It is *prima facie* entitled therefore to

have its property back. The defendant's answer is a little complex. It says it is entitled to a lien over the two share certificates by reason of an antecedent transaction which, according to the defendant's own story, is in the following terms.

**[3]** One Dato Mohd Yusoff bin Abdul Latiff is a director of the plaintiff. He used the name of his secretary, Nancy Ng, to obtain certain loans from a company called Credit Leasing Corporation (M) Sdn. Bhd. or CLC for short. The defendant says that it settled the CLC loans or, what at the trial was referred to as the "Nancy loans". The thrust of the defendant's case is to be found in para. 4(1)(d) of its amended statement of defence and counterclaim. This is how the paragraph reads:

> at the request of Datuk Yussof, the Defendant through its shareholders paid to Credit Leasing a total sum of RM470,955.46 (inclusive of interests) in full and final settlement of the loan facilities obtained by Datuk Yussof from Credit Leasing using his secretary's name and in consideration whereof, Datuk Yussof agreed with the shareholders of the Defendants that the Plaintiff's said shares shall be held by the Defendants as beneficial owners until such time that Datuk Yussof or the Plaintiffs repay the said sum of RM470,955.46 together with interest at the rate of 15% per annum or at the rate charged by Thai Military Bank, Bangkok, to the Defendants.

**[4]** The learned judge, after a trial at which *viva voce* evidence was led made the following finding:

> Taking their evidence together, I have no hesitation in making a finding, on the balance of probabilities, that it was the Defendant who paid DW2's loan to CLC.

For completeness we must mention that DW2 was Ms. Nancy Ng in whose name the CLC loans were taken.

**[5]** The learned trial judge came to the conclusion, after a careful analysis of the evidence, that the plaintiff was entitled to have its shares. An appeal was brought to this court against that finding and after hearing arguments a differently constituted Bench of this court on 5 March 2002, remitted the case to the learned judge to obtain his views on the following issues:

1) Whether the defendant made the payment of the loan to Credit Leasing Corporation Sdn. Bhd.;

2) Whether the defendant had a lien over the shares No. 027 and 051 of Global Harvest Sdn. Bhd.;

3) If the defendant had a lien was it legal or equitable lien;

4) Whether such a lien is barred by either limitation or laches;

5) Whether there was any unjust enrichment;

6) If so, was it barred by either limitation or laches.

**[6]** The learned judge in his judgment dated 7 January 2003, answered the issues as follows: the first issue in the affirmative; all the other issues in the negative. The judge's initial decision was not altered by his reconsideration of the issues remitted to him by this court. In other words the plaintiff still succeeded.

**[7]** In arguing this appeal, learned counsel for the defendant has submitted that the learned judge's decision cannot stand for two reasons. First, because his first judgment dated 30 May 2001, contains passages upon the critical issues which are contradicted by passages in his later judgment. The relevant passages relied upon by the defendant are as follows:

(i) It is further noted that, upon payment of the loans to CLC, all the Global Harvest shares including the shares belonging to the plaintiff, returned by CLC were used as collateral for the various loans taken by the defendant. Thus the evidence of DW1 that the defendant was to keep the said two share certificates, until PW1 settle the loan cannot be true. The defendant did not in fact keep the share certificates, instead used the share certificates as collateral to obtain loans, and the loans taken were not for the benefit of the plaintiff but for the defendant's self interest.

(ii) Taking the evidence of PW1 and DW2 as a whole, there is no doubt that the two share certificates of Global Harvest belonging to the plaintiff as well as other Global Harvest shares belonging to the defendant as well as other company shares involving the Chan family, PW1 and Syed Azahari were pledged to the various financial institution inside and outside Malaysia for the purpose of borrowing. Though I am unable to accept PW1's evidence that the purpose of the borrowing was to pay the fine of Singapore RM2 million, there is ample evidence that the two Global Harvest share belonging to the Plaintiff were pledged to the various financial institution for the business of the companies run by the Chan family together with PW1 and one Syed Azahari. Thus what is left to be decided by this Court is whether the

A defendant had a lien over the said two share certificates preventing it being returned to the plaintiff until and unless the sum of RM470,955.46 together with interest is paid by the plaintiff to the defendant.

B **[8]** With respect we are unable to agree with the arguments of learned counsel. In our judgment when the above passages are read in the context of the whole case there is no contradiction between them at all. To paraphrase the learned judge, this is what he was saying. That the CLC shares were secured by the two share certificates. That the loans were taken by PW1, ie, Dato C Yussof Latiff and the latter loans were obtained by pledging the same two share certificates with various other financial institutions and the monies obtained thereby were used by the Chan family, Dato Yussof and one Syed Azahari. It was for the defendant of course to establish that there was an agreement between itself and D the plaintiff in order to maintain its claim of a lien over the shares in question. Needless to say the defendant did not come up with proof. That is hardly surprising because nowhere in its pleaded case is there mention of an agreement between itself and the plaintiff in respect of the shares. As may be seen from its amended E case already referred to earlier, its dealings were with Dato Yussof. It is apparent to us that there is a confusion in the appellant's mind about the dealings that form the factual matrix of its defence.

**[9]** It is trite that a company is a separate individual from its F share-holders and directors. The property of the company belong to the company, not to the share-holders or directors. These elementary principles were established in the seminal case of *Salomon v. Salomon & Co.* [1897] AC 22 at 30. Recently, this Court had the occasion to reemphasise this point in *Law Kam Loy* G *& Anor v. Boltex Sdn. Bhd. & Ors* [2005] 3 CLJ 355 CA.

**[10]** In the face of the plea taken by the defendant, the learned judge's approach is beyond criticism. At the end of the day when the dust of the argument that had clouded this case settles only H one real issue emerges. It is this. Was the judge entitled to accept the evidence of the plaintiff in preference to that of the defendant? We think he was. As was pointed out in the course of the arguments by our learned brother Mohd Ghazali JCA, there was not a scrap of evidence either by way of correspondence or a I board resolution evidencing the agreement asserted by the defendant. In these circumstances how are we, as a Court of

Appeal to approach the findings made by the learned judge? We think that the answer has been provided to us by the speech of Lord Shaw of Dunfermline in *Clarke v. Edinburgh & District Tramways Co.* [1919] SC (HL) 35, 36 where His Lordship says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

**[11]** Applying the approach set out in the above quoted passage, it is our duty to defer to the learned judge's finding of fact that there was no agreement between the defendant and the plaintiff. At the risk of repetition, that was not the defendant's pleaded case. The duty of the trial judge was to decide the issues raised by the parties, see *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45 CA. The learned judge, it is quite clear, adhered to this rule.

**[12]** For the reasons already given this appeal is without merit. It is dismissed. The defendant must pay to the plaintiff the costs of this appeal. The deposit will be paid out to the plaintiff to account of its taxed costs. All orders of the High Court are affirmed.